

Ronald Reinstein (Judge, ret.) Chair
Capital Case Oversight Committee, Petitioner
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SUPREME COURT OF ARIZONA

PETITION TO AMEND RULE 31.5,) Supreme Court No. R-19- _____
ARIZONA RULES OF CRIMINAL)
PROCEDURE)
)
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_____)

The Capital Case Oversight Committee through its undersigned Chair petitions this Court to adopt an amendment to Rule 31.5 of the Arizona Rules of Criminal Procedure. The proposed amendment is appended to this petition.

1. Background. Under Arizona law, there usually are three phases of a capital case. The first phase is a trial in the superior court. The second phase is a direct appeal to the Arizona Supreme Court. The third phase is a proceeding for post-conviction relief (“PCR”), which is commenced in the trial court. Capital case defendants are almost always indigent, and they accordingly have a right to court-appointed counsel during each of these phases. The Arizona Revised Statutes and the Arizona Rules of Criminal Procedure govern the appointment of counsel in capital cases.

(a) *Trials.* Criminal Rule 6.2(a) requires the presiding judge of each county to establish a procedure for the appointment of counsel for indigent defendants. Criminal Rule 6.2(b) specifically requires the presiding judge to appoint two attorneys for an indigent defendant during the trial stage of a capital case.

(b) *Appeals.* The appointment of counsel on appeal is governed by Criminal Rule 31.5. The rule does not now contain a specific provision for the appointment of counsel on the direct appeal of a capital case. However, the rule provides that a defendant who was indigent when sentenced — which includes virtually every capital defendant — may proceed as an indigent on appeal, without further court authorization. Accordingly, the trial court now appoints appellate counsel in a capital case under Rule 31.5 in the same manner it appoints counsel in a non-capital case.

(c) *Post-conviction proceedings.* A post-conviction proceeding begins with the filing of a notice in the trial court requesting relief. Criminal Rule 32.4(b) contains separate provisions for the appointment of counsel in a post-conviction proceeding based on whether the case is capital or non-capital. The provision for capital cases, Rule 32.4(b)(1), currently provides,

After the Supreme Court has affirmed a capital defendant's conviction and sentence, it must appoint counsel who meets the standards of Rules 6.5 and 6.8 and A.R.S. § 13-4041. Alternatively, the Supreme Court may authorize the presiding judge of the county where the case originated to appoint counsel. If the presiding judge makes an appointment, the court must file a copy of the appointment order with the Supreme Court. If a capital defendant files a

successive notice, the presiding judge must appoint the defendant's previous post-conviction counsel, unless the defendant waives counsel or there is good cause to appoint another qualified attorney who meets the standards of Rules 6.5 and 6.8 and A.R.S. § 13-4041.

A.R.S. § 13-4041(B) includes a parallel provision that requires the Supreme Court to appoint counsel for a capital defendant in the PCR proceeding. Like Rule 32.4(b)(1), the statute allows the Supreme Court to authorize the presiding judge of the county where the case originated to make that appointment. A.R.S. § 13-4041(C) further requires the Supreme Court to “establish and maintain a list of persons who are qualified to represent capital defendants in post-conviction proceedings.”

(d) Oversight Committee’s analysis. Although this structure—where the trial court appoints counsel on direct appeal, and the Supreme Court appoints counsel on the PCR proceeding—may have an historical rationale, the Oversight Committee for the following reasons proposes a change.

The appellate court is more knowledgeable about the qualifications of attorneys handling appeals because it reviews their written work product and hears their oral arguments. The Oversight Committee therefore believes that the appellate court—i.e., the Supreme Court—rather than the trial court should appoint counsel for a direct appeal in a capital case. This rule petition is necessary to allow the Supreme Court to do so.

Correlatively, the trial court has more knowledge about attorneys who appear in that court for capital post-conviction proceedings. PCR pleadings are filed in the

trial court, and any evidentiary hearing is before that court. The trial court is more familiar with the qualifications of post-conviction counsel and it should appoint counsel in these proceedings. Although it does not presently do so, A.R.S. § 13-4041(B) already allows the Supreme Court to delegate appointments on capital PCRs to the presiding trial court judges. The Oversight Committee envisions that the Supreme Court would delegate the authority to appoint counsel in a capital PCR to a presiding judge on a case-by-case basis.

As explained above, the superior court currently appoints counsel on appeal, including a direct capital appeal, under Rule 31.5 of the Arizona Rules of Criminal Procedure. On December 13, 2018, the Oversight Committee requested the Arizona Judicial Council's authorization to file a rule petition proposing an amendment to Rule 31.5 that would specifically allow the Supreme Court to appoint counsel for the defendant on the direct appeal of a capital case. The Council approved that request.

2. Discussion of the proposed amendment. Criminal Rule 31.5 is titled "Appointment of Counsel on Appeal; Waiver of the Right to Appellate Counsel." The current rule has six sections designated (a) through (f). The Oversight Committee proposes inserting a new section (f) titled, "Appointment of Counsel in a Capital Case." The addition of new section (f) would require designating current section (f) ("Waiver of Right to Counsel") as section (g), as shown in the attachment.

Proposed new section (f) is one sentence. This sentence would expressly provide for the Supreme Court’s appointment of appellate counsel in a capital case. It says, “In a capital case, the Supreme Court must appoint appellate counsel for an indigent defendant on a direct appeal.”

3. Conclusion. The Oversight Committee requests the Court to open this petition for public comment. The Oversight Committee will thereafter review the comments and file a reply.

RESPECTFULLY SUBMITTED this 9th day of January 2019.

By _____
Ronald Reinstein (Judge, ret.), Chair
Capital Case Oversight Committee

Proposed amendment to Rule 31.5, Arizona Rules of Criminal Procedure

Deletions are shown by ~~strike through~~. Additions are shown by underline.

Rule 31.5. Appointment of Counsel on Appeal; Waiver of the Right to Appellate Counsel

(a) **Determination that the Defendant Is Indigent.** [No change to the text of this section]

(b) **Contribution by the Defendant.** [No change to the text of this section]

(c) **Motion in the Appellate Court.** [No change to the text of this section]

(d) **Notice of an Order to Proceed as Indigent.** [No change to the text of this section]

(e) **Appointment of Counsel.** [No change to the text of this section]

(f) Appointment of Counsel in a Capital Case. In a capital case, the Supreme Court must appoint appellate counsel for an indigent defendant on a direct appeal.

(f) **(g) Waiver of Right to Counsel.** [No change to the text of this section]